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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1956**

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# No. 631

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BILL CORBETT,

*Petitioner*

*vs.*

UNITED STATES OF AMERICA,

*Respondent*

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## REPLY BRIEF OF PETITIONER

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The Respondent's brief in opposition to the Petition for Certiorari contains several statements of fact which require correction or clarification and raises two legal arguments to which Petitioner here makes brief reply.

### Corrections of Respondent's Statements of Fact

(1) The Government's brief (Br. 5) states that the total of all entries of cash receipts directly in the allowance column on the guest ledger sheets was $22,579 in 1945 and $29,785 in 1946. In fact, as the Government later recognizes (Br. 9), these figures are the totals of all allowance entries in the allowance journal (R. 783) and represent considerably more than the Government's total claim of unreported income for the years in question. The total of all

items identified as cash receipts entered directly as allowances was $100 for 1945 and $259 for 1946 (R. 449-453).

(2) The Government correctly points out (Br. 9-10) that the figures used in the computation of Government witness Holtberg as representing income recorded as fictitious allowances were not the totals from the allowance journal, but were the totals of allowance entries on guest ledger sheets introduced in evidence (R. 797). These figures were $14,960 for 1945 and $17,543 for 1946. The Government asserts (Br. 11) that "Treasury agents segregated with great care the items claimed to have been proved false." Actually, there is evidence only that revenue agent McCarthy collected and classified some of the ledger sheets bearing allowance entries without undertaking to determine the validity of those entries (R. 747-757) and that Holtberg assumed that all allowance entries on all ledger sheets in evidence were false (R. 808). As demonstrated on pages 5-8 of the Petition for Certiorari, the figures employed by Holtberg exceded what was shown by the evidence to be fictitious allowances by more than $14,000 for each of the years 1945 and 1946. As shown on page 10 of the Petition, if Holtberg's computation had been confined to the evidence it would not have shown a tax deficiency resulting from fictitious allowance entries for either of the years in question.

(3) Witness Vowles testified that no charge was made on guest ledger sheets for employees living at the hotel (R. 634). This was contradicted by Government witness Marx, who had found allowance entries offsetting previous charges on the ledger sheets for employees residing at the hotel (R. 787), and by Petitioner, who testified that for employees living at the hotel rent was charged on the ledger sheets but was not collected and was later wiped off by allowance entries (R. 906-907, 1027-1028). The Govern-

ment now states (Br. 10) that, "None of the allowances treated as unreported income [in Holtberg's computation] related to employees." No witness who could have had knowledge of the facts so testified and Holtberg testified that he made no effort to ascertain how many employees lived at the hotel (R. 809) and that he "took the figures from the documents in evidence which does not include any allowances for employees, as I understand it" (R. 822).

(4) The Government admits (Br. 11-12) that there was conflict in the testimony of witness Vowles as to the amount of unreported night rentals, his estimates ranging from "over $7,200" for a two and one-half year period to $20 to $30 per night, and that Government witnesses Marx and Holtberg resolved the conflict by selecting the figure of $20 per night. The Government asserts, however, that the conflict in Vowles' testimony was called to the jury's attention and that the court stated in its charge that the jury was not bound by the Government's choice of estimates. But the trial court also adverted to "certain persons including government agents and accountants qualified as experts" who had testified in the case and instructed the jury that, while it was not bound by expert testimony, "it should be considered by you in connection with all the other evidence in the case" and that the jury should "evaluate and appraise the testimony of the witness who expresses an opinion precisely as you would evaluate and appraise the testimony of a witness who testifies to facts within his personal knowledge" (R. 1128-1129). As shown on page 10 of the Petition, and contrary to the Government's implication (Br. 12), if the jury had without this "expert" assistance resolved the conflict in Vowles' testimony by accepting his $7,200 estimate, it could have found no tax deficiency on the basis of unreported night rentals for either of the years in question.

(5) The Government asserts (Br. 13) that the trial court instructed the jury that Holtberg's computation was not, strictly speaking, evidence. But the trial court also instructed the jury that the computation was admitted in evidence as "a summary of the evidence admitted in the case (R. 1124) and, as shown at page 23 of the Petition, this instruction merely reiterated the court's frequent and erroneous statement during the trial that all of the evidence upon which the computation was based was in the record.

**Failure to Prove a Deficiency in Reported Income**

The Government does not dispute the statement on page 10 of the Petition that the total of proof on specific items of income recorded as allowances and on unrecorded night rentals did not establish a deficiency of reported income for any year in question or for the entire period. Instead, the Government objects to being confined to the items actually proved, but adverts to a "great body of other proof tending to show that the allowance were nothing more than a tax evasion device" (Br. 11) and invokes the rule that "the important issue was not the precise amount of tax evaded" (Br. 12).

But, while the precise amount of tax evaded or of income unreported need not be shown, it is necessary for the Government to show that there was a deficiency of reported income "for each of the prosecution years." *United States v. Calderon*, 348 U.S. 160, 168 (1954). Here, the record showed total allowance entries of $22,479 for 1945 and $29,785 for 1946, but showed improper allowances only of $662 for 1945 and $2,809 for 1946. Because of the Government's own evidence of restorations to income (Pet. 10), it was necessary to increase the improper allowances to something substantially in excess of $3,066 for 1945 and $7,106 for 1946 in order to establish a deficiency in reported

income for either year. Witness Holtberg, by what could only have been speculation, selected figures of $14,960 for 1945 and $17,543 for 1946. There was no basis in the record for these selections and such speculation was improper whether undertaken by a Government witness or by the jury.

Alternatively, the Government argues that the necessary deficiency in reported income is shown by Vowles' testimony as to unreported night rentals. By selecting, from Vowles' varying estimates, the $20 per night figure, and by ignoring Vowles' testimony that he reported all night rentals for two periods of unspecified duration in 1945 and 1946 (R. 610), Government witnesses Marx and Holtberg produced figures on unreported night rentals which barely showed a deficiency for each year—$3,680 for 1945 and $7,300 for 1946. But here again the selection of figures was the product of sheer speculation, unsupported by anything in the record.

Without the improper speculations of Marx and Holtberg, the record contained no evidence of any deficiency in reported income for any year. The jury could have convicted Petitioner, therefore, only by accepting the speculations of Government witnesses or by substituting equally unwarranted speculations of its own.

### The Alleged Waiver of Objections

The Government states (Br. 8, 12) that the computation prepared by witness Holtberg (Govt. Ex. 74) was introduced without objection. In fact, defense counsel did object to its competency (R. 793), and after Government counsel had explained that the exhibit "would simply be demonstrative of the testimony" and witness Holtberg had testified that it was based on the "documents and testimony in evidence" (R. 794), objected again that the ex-

planation "leaves it too broad to determine upon what basis he made his computations" (R. 795). The trial court then, without ruling on admissibility, directed that copies of the exhibit be passed to the jury (R. 795) and allowed Holtberg to read the contents of the exhibit from the witness stand (R. 796-805). During the course of Holtberg's testimony the court indicated that it understood the computation to be based on evidence in the record (R. 801). The court had previously indicated its understanding that the calculations of Government witness Marx, which were included in Holtberg's computation, were likewise confined to evidence of record (R. 774, 777). After all details of the exhibit had been thus placed before the jury, defense counsel conceded, when the exhibit was again offered in evidence, that it was "descriptive of the witness' testimony" (R. 824).

The Government also states (Br. 14) that the various financial statements purporting to show Petitioner's net worth (Govt. Exs. 27, 31, 38, 71) were admitted in evidence "over objections not relevant here." In fact, defense counsel did object to the competence, the materiality and the hearsay character of Exhibits 27, 31 and 38 (which were statements given by Petitioner to various banks) when they were first offered, and ruling on their admissibility was reserved (R. 127-128, 136-137). Later, Exhibit 71 (a statement given by Petitioner to revenue agent McCarthy) was admitted over defense counsel's objections that the *corpus delicti* had not been established and that the Commissioner of Internal Revenue had not certified any tax deficiency (R. 740). Exhibits 27, 31 and 38 were then re-offered, defense counsel stated "the same objection I had before" to "statements made to third parties," the objection was overruled, and the exhibits were admitted in evidence (R. 741).

The purpose of the Government's statements that these various exhibits were received without objection or with-

out relevant objection is to invoke the rule of *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) that objections which are "plainly waived" in the trial court cannot be raised on appeal. But this is not such a case.

The *Johnson* case adopted and quoted with approval the statement of the rule expressed by Mr. Justice Sutherland in *United States* v. *Manton*, 107 F. 2d 834, 848 (C.A. 2, 1938):

> If the failure to enter an exception or assign error had been a mere inadvertence the matter might stand in a different light. But that view cannot be indulged. Plainly enough, counsel consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied. We see no warrant for the exercise of our discretion to set aside standing rules, so necessary to the due and orderly administration of justice, and review the challenge to the legal accuracy of the charge where, as here, the failure of the judge to follow the text of the requested instruction was, at the last, induced by action of counsel.

Here, defense counsel clearly did not abandon his objections to the three financial statements which were used so extensively and improperly by the Government to impeach Petitioner's testimony (Pet. 17, 27). And defense counsel's failure to reiterate his objection to Holtberg's computation was, if not the result of inadvertence, at least the result of a misapprehension about the basis for the computation which was shared by the trial court. The court's action in admitting the computation into evidence was induced, not by defense counsel, but by counsel for the Government and Government witnesses Marx and Holtberg.

Moreover, as recognized in the *Johnson* case (at p. 200), this Court will consider errors to which no objection was

made below if they would "seriously affect the fairness, integrity or public reputation of judicial proceedings," and Rule 52(b) of the Federal Rules of Criminal Procedure now provides that, "Plain errors or defects affecting substantial rights may be noticed though they were not brought to the attention of the court." That practice is followed "where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest." *Screws* v. *United States*, 325 U.S. 91, 107 (1945). See also *United States* v. *O'Connor*, 237 F. 2d 466, 472 (C.A. 2, 1956) and cases cited. It should also be followed in a case where the error is so fundamental that it permits the Government by improper means to cure an omission in its proof of one of the essential ingredients of the only offense on which the conviction can rest.

Respectfully submitted,

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